PROPERTY IN CHATTELS

II

PROPERTY IN THE BAILOR

ONE from whom chattels had been taken could not sue the second trespasser and this, as we have seen,[1] was ascribed by Brooke to a change of "property" by the first trespass and by Brian, C. J., to the fact that possession was out of him by the first trespass and that, therefore, the second trespasser was not a trespasser as to him. It has been thought that the early law went even further than this and in the beginning denied trespass altogether against the third hand,[2] and, as it was extremely difficult, perhaps impossible, to frame a count in detinue against the third hand,[3] that until the development of the action on the case, the interest of the bailor, whether thought of as "property" or not, was so inadequately protected by judicial remedies as hardly to deserve that name.[4]

That in the earlier law the interest of the bailor was thought of as property, or at least that the bailed goods were thought of as "his" rather than the bailee's, has been placed beyond serious question by Pollock and Maitland.[5] We find no such puzzling statements as to a change of property by a bailment as we do of a trespass.[6] Whatever might be the case with the trespasser or thief, the bailee as such was no disseisor. He did not hold the chattel as his own but as that of another.[7] The instances we are given where he was said to have been "seised" are rare.[8] Commonly speaking, the bailed

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[1] *Supra*, p. 383.

[2] 2 P. & M., 2 ed., 172.

[3] *Ibid.*, 176; Ames, "History of Trover," 3 SELECT ESSAYS, 434. But see 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 274.

[4] 2 P. & M., 2 ed., 153, 182.

[5] *Ibid.*, 176.

[6] *Supra*, p. 374.

[7] 2 P. & M., 2 ed., 176.

[8] Maitland gives an instance where seisin is attributed to the pledgee by Glanville (1 LAW QUART. REV. 325). There are many instances where "seised" was used of the distrainor, thief, testator, and executor. (Maitland, "Seisin of Chattels," 1 LAW QUART. REV. 324.) See also 2 P. & M., 2 ed., 176, and *supra*, p. 380.

goods were in his *custodia* just as the lands of the ward were in the *custodia* of the guardian. The special association of "custody" with the servant is recent.[9] The bringing of detinue, in which a bailment or loss was ordinarily alleged, affirmed property continually in the plaintiff.[10] Where in order to support the bailee's right to the general writ of trespass, it was said that he had a property, this was as against strangers and not against the bailor.[11] Counsel in 1409 argued that the bailor for a term did not have property during the running of the term, but Hankford, J., replied: "I know well that the cases are not in accord with what you have said." [12]

Professor Gray's studies in the law of future interests in personal property [13] give added force to Pollock and Maitland's argument, "that, if once the bailee had been conceived as owner, and the bailor's action as purely contractual, the bailor could never have become the owner by insensible degrees and without definite legislation. We know, however, that this happened; before the end of the middle ages the bailor is the owner, has 'the general property' in the thing, and no statute has given him this." [14] From the decision of an English judge in 1889 [15] and the *dicta* of modern text-writers.[16] Professor Gray goes back [17] to a case in 1459 [18] to show that the law at that time saw no difficulty in one's having an interest in a personal chattel for life while the property was in another. The technical law of estates had no application to such chattels and that is all that was meant by Brooke in his famous statement that "a gift or

[9] Mr. Justice Stephen used "custody" as a technical term in contradistinction to "possession" to indicate the holding of the servant as distinguished from a holding by one on his own account (CRIMINAL LAW, Art. 281, App. note XIII), but how little custody had come to be used in that technical way even in the criminal law may be seen by an examination of the cases under Distinction between Possession and Custody in BEALE, CASES IN CRIMINAL LAW, pp. 731–765. Mr. Justice Holmes followed Mr. Justice Stephen (COMMON LAW, 226) and the present vogue of the term as a technical term to indicate the holding of the servant is believed to be due to the influence of his work.

[10] Y. B. 22 HEN. VI, 15–26; Y. B. 6 HEN. VII, 8–4, by Vavasor, J.; *Ibid.*, 9–4, by Brian, C. J.; 1 Rolle 128, by Doderidge, J.

[11] Y. B. 11 HEN. IV, 17–39; Y. B. 11 HEN. IV, 23–46; Y. B. 9 EDW. IV, 34–9, by Needham and Choke, JJ.

[12] Y. B. 11 HEN. IV, 23–46.

[13] RULE AGAINST PERPETUITIES, 3 ed., § 821 *et seq.*

[14] 2 P. & M., 2 ed., 177.

[15] *In re* Tritton, 6 Morrell, Bankr. Cases, 250; 5 GRAY, CASES ON PROPERTY 2 ed., 124.

[16] §§ 831, 854.

[17] § 826.

[18] 37 HEN. VI, 30–11.

device of a chattel for an hour is forever." [19] In 1565, not long after the close of the Year Book period, it was even said that one to whom and the heirs of his body divers jewels and pieces of plate had been devised "had no property in such plate but only the use and occupation," and it was the late Lord Chief Justice of England who had made the devise.[20] However inadequate the protection given the bailor may have been, we can hardly doubt that from the first it was to him that the common law ascribed the property.[21]

Such foundation as there is for the opposite view lies in the belief that before the development of the action on the case, detinue was the only action open to the bailor,[22] that detinue was contractual,[23] and that, therefore, the only right of the bailor was contractual. If detinue was contractual, however, it was so in the sense that debt was contractual, and debt was closely connected with the most proprietary of all actions, the writ of right.[24] It was at least debated in 1292 that the right of action in detinue was based on the tortious detainer and not on the bailment,[25] and Pollock and Maitland regarded the nature of the action as remaining open to our own time.[26] But, however it may have been as to the limitations or scope of detinue,[27] it is believed that the right of the bailor to trespass was more extensive than is currently accepted and that the foundations of that right go back even beyond the case and text law of Bracton's time to our earliest judicial records.

That the bailor in England was at one time denied all relief against the third hand was suggested to students of the continental law like Laughlin [28] and Holmes [29] by the existence of a definitely formulated scheme to that effect in the continental law and the evi-

[19] BRO. ABR. DEV. 13.

[20] Fitz-James Case, Owen 33; 5 GRAY, CASES ON PROPERTY, 2 ed., 112; GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 80. But see GRAY, RULE AGAINST PERPETUITIES, 3 ed., § 825.

[21] In BRACTON & AZO, p. 183, Maitland says we cannot be certain that this was true of all kinds of bailments.

[22] See 2 P. & M., 2 ed., 172.

[23] Ames, "History of Trover," 3 SELECT ESSAYS, 432.

[24] 2 P. & M., 2 ed., 177.

[25] Y. B. 20–1, EDW. I, 191, quoted 2 P. & M., 2 ed., 180.

[26] 2 P. & M., 2 ed., 180, n. 2.

[27] See 3 HOLDSWORTH, HISTORY OF ENGLISH LAW, 274, for an opinion that the scope of detinue may not have been as limited as is currently accepted.

[28] ESSAYS IN ANGLO-SAXON LAW, p. 197 *et seq.*

[29] COMMON LAW, p. 164 *et seq.*

dent kinship between the English appeal of larceny and action for a *chose adirée* and the corresponding continental actions.

Of the continental scheme Pollock and Maitland say: [30]

"When French and German law take shape in the thirteenth century, they contain a rule which is sometimes stated by the words, *Mobilia non habent sequelam* (*Les meubles n'ont pas de suite*), or, to use a somewhat enigmatical phrase that became current in Germany, *Hand muss Hand wahren*. Their scheme seems to be this: If my goods gó out of my possession without or against my will — if they are unlawfully taken from me, or if I lose them — I may recover them from anyone into whose possession they have come; but if, on the other hand, I have of my own free will parted with the possession of them — if I have deposited them, or let or lent or pledged or 'bailed' them in any manner — then I can have no action for their recovery from a third possessor. I have bailed my horse to A.; if A. sells or pledges it to X., or if X. unlawfully takes it from A., or if A. loses and X. finds it — in none of these cases have I an action against X.; my only action is an action against my bailee, against A. or the heirs of A. 'Where I have put my trust, there must I seek it.' We have not here to deal with rules which in the interest of free trade protect that favorite of modern law, the *bonâ fide* purchaser. Neither the positive nor the negative rule pays any heed to good or bad faith. If my goods go from me without my will, I can recover them from the hundredth hand, however clean it may be; if they go from me with my will, I have no action against anyone except my bailee."

They then go on: [31]

"Of late years learned writers have asserted that the negative or restrictive half of this scheme was at one time a part of English law. There is much, it is said, in the Year Books, something even in our modern law, which cannot be explained unless we suppose that the rule *Mobilia non habent sequelam* held good in this country, and that the man who had bailed his goods had no action against any save his bailee."

And finally, in answer to the implied query, they say: [32]

"That the bailor has no action against any person other than his bailee, no action against one who takes the thing from his bailee, no action against one to whom the bailee has sold or bailed the thing — this is a proposition that we nowhere find stated in all its breadth. No

[30] Page 155. [31] Page 156. [32] Page 172.

English judge or text-writer hands down to us any such maxim as *Mobilia non habent sequelam.* Nevertheless, we can hardly doubt that this is the starting point of our common law. We come to this result if one by one we test the several actions which the bailor might attempt to use. These are but three: (1) the appeal of larceny, (2) the action of trespass, and (3) the action of detinue. The first two would be out of the question unless there had been an unlawful taking, and in that case, as already said, there seem to be ample reasons for believing that the taker could be successfully attacked by the bailee and by him only."

That the developed continental scheme exercised a direct influence on the common law is not likely, for then we should have expected to find in England those maxims in which on the Continent the denial to the bailor of a remedy against the third hand is embodied, and we do not find them. It has been urged, however, that both the continental scheme and the English appeal of larceny can be traced back to a common origin in the old Germanic action for cattle stealing [33] and, although this is based on inference,[34] it has now come to be accepted that the bailor was denied that action.[35]

But to argue from an inferential denial of that action to the bailor in early Anglo-Saxon times to a denial of the appeal of larceny to the bailor in the 1200's is to assume a development in the law of crimes and criminal procedure in England parallel to that on the Continent, and in general that development was not parallel. We have Pollock and Maitland's word for it that "the common law of theft is wholly post-Norman." [36] The 1100's marked a revolution in the law of crimes and torts in England, and it is from that revolution that our modern law of crimes and torts dates.[37] The procedural instrument by which that revolution was wrought seems to have been the appeal of felony.[38]

For one thing, the appeals were much more highly penal than the actions that they had superseded. This is illustrated by the contrast drawn by Pollock and Maitland between the *actio furti* of Bracton and the definite appeal of larceny.[39] The former could be used to recover property from an innocent purchaser from a thief,

[33] See *supra*, p. 503, notes 28, 29, and 2 P. & M., 2 ed., 157 *et seq.*
[34] HOLMES, COMMON LAW, p. 166, n.
[35] 2 P. & M., 2 ed., 159, citing Brunner, 2 D. R. G. 510.
[36] 1 P. & M., 2 ed., 56.
[37] 2 P. & M., 2 ed., 448, 458.
[38] *Ibid.*, p. 462.
[39] *Ibid.*, p. 165.

although the thief was not found;[40] in the latter it was coroner's law that property could only be recovered if the thief were attainted at the suit of the appellor.[41] In the *actio furti* the accused could vouch the one from whom he had received the property and the action then proceeded against his vouchee.[42] This voucher to warranty disappeared in the appeals.[43] Bracton does not mention it in connection with the appeal of robbery at all,[44] although he elaborates it in his account of the *actio furti*.

Of more direct bearing on the right of the bailor to an action against the third hand was the change as to the requirement of fresh suit on the part of the prosecutor. Bracton says it was still necessary in all appeals "to raise the hue and cry as quickly as possible and to go with the hue to the neighboring and next vills and there declare the crimes and injuries perpetrated,"[45] but Britton speaks as if fresh suit were no longer necessary and a requirement of prosecution within a year and a day substituted in its place.[46] In this he was doubtless giving a larger interpretation to the Statute of Gloucester[47] than was subsequently accepted,[48] but although the Statute of Gloucester be confined to appeals of homicide, it is probably a recognition that the old fresh pursuit had become antiquated and that a new turn was being given to it, that of fresh prosecution and attainder at the suit of the appellor.[49] In the enforcement of this requirement the judges were at times so severe as to make the restitution of stolen goods look like a "prize for good conduct."[50] It seems doubtful whether the old "fresh

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[40] BRACTON, fol. 151.

[41] AMES, "History of Trover," 3 SELECT ESSAYS, 421; Y. B. 8 EDW. III, 10–30.

[42] BRACTON, fol. 151.

[43] 2 P. & M., 2 ed., 165.

[44] Fol. 146, Fleta follows BRACTON, Lib. 1, C. 39. Britton groups the appeals of robbery and larceny and gives the voucher to warranty as a defense common to both. (1 NICH. 116.) This would seem to be a tribute to its former importance rather than evidence of its continued use. Early instances of its use where robbery was charged are SEL. PL. CR., pl. 124, and BRAC. NO. BK., pl. 67.

[45] Fol. 139 *b;* 2 P. & M., 2 ed., 160.

[46] 1 NICH. 118.

[47] C. 9.

[48] 2 CO. INST. 317.

[49] The changed conditions of restitution which Professor Ames (LECTURES, p. 54) recognized in the time of Henry VIII seem to have been an accomplished fact in the time of Britton. That the judges did not feel themselves bound by the letter of the old rules is intimated in 2 P. & M., 2 ed., 161.

[50] 2 P. & M., 2 ed., 165.

pursuit" was ever a vital requisite to the appeals as distinguished from the local actions they superseded.

But if it is a big jump to argue from what is known of the early Germanic action for cattle stealing to the appeal of larceny of the 1200's, it is even more of a jump to argue from the former to the appeal of robbery, and although the fact has generally been overlooked, it is to the appeal of robbery rather than to the appeal of larceny that trespass is to be traced. In the older law robbery is not a kind of aggravated larceny, but a distinct offense,[51] and the appeal of robbery antedates the appeal of larceny by some time.[52]

That the appeal of robbery rather than the appeal of larceny was the precursor of trespass in the king's court is evident in many ways. Larceny was a fraudulent taking, a taking by stealth; robbery, like trespass, a taking by force. Bracton apparently identifies the appeal of robbery with the *actio vi bonorum raptorum* of the Institutes.[53] Bigelow gives as a "prototype" of trespass an appeal of robbery in 1194 when it was charged that the defendants came "*cum vi et armis et robberia.*" [54] In later days it is from the appeal of robbery that Littleton [55] and Choke [56] argue to trespass. In fact the appeal of larceny seems to have been almost still-born. In Bracton's time it seems to have been used almost solely by the approver,[57] and how little impression it made on the law may be gathered from the fact that, although Pollock and Maitland say that Bracton seems hardly to have known the appeal of larceny,[58] it is only in a quotation from Bracton that the indexer of Staunford's Plees Del Coron saw any reference to it in that work,[59] while the references to the appeal of robbery are numerous. It is scarcely

[51] *Ibid.*, 493.

[52] *Ibid.*, 494.

[53] BRACTON & AZO, p. 182.

[54] HIST. PROC. p. 277; PLACITA ANG.-NORM. p. 285. See also 2 P. & M., 2 ed., 526.

[55] Y. B. 2 EDW. IV, 15–7.

[56] Y. B. 9 EDW. IV, 33–9.

[57] Six out of the ten appeals of larceny listed in Bracton's Note-Book involved approvers. In Pollock and Maitland's table of actions taken from the Northumberland Assize Rolls for the years of 1256, 1269, and 1279, and from the Roll of the Common Bench for the Easter term of 1271 (2 P. & M., 2 ed., 565, 567) there are ten appeals of robbery and only three appeals of larceny, all three of which were brought by approvers.

[58] 2 P. & M., 2 ed., 494.

[59] Staunf. P. C., 28 *a*.

mentioned in Fitzherbert's [60] and Brooke's [61] Abridgments, while appeals of robbery are fairly common. The truth seems to be that the action for a theft hardly left the seclusion of the local courts, while the appeal of robbery had quite a vigorous existence even after the closely related *vee de nam*, replevin, and trespass had occupied much of its former field.

The speculative character of the denial of the appeals to the bailor is brought out by Pollock and Maitland's summary:

"And, having thus given the action to the bailee, we must in all probability deny it to the bailor. As already said, in the days when the *actio furti* still preserved many of its ancient characteristics, when it began with hue and cry and hot pursuit, it was natural that the bailee rather than the bailor should sue the wrongful possessor. But already in the thirteenth century a force was at work which tended to disturb this arrangement." [62]

If it were necessary to choose between them, the one-time importance of fresh pursuit is a reason for assigning the appeals to the bailee and denying it to the bailor, but Mr. Justice Holmes, who argues that it was necessary to choose, has to go to the law of the Lombards to support his position.[63] A century after Bracton's time Cavendish, C. J., saw no such necessity, but gave trespass to both.[64] The foundations for his opinion lay in what had been said and practiced as to the appeals in Bracton's time and even before. If we proceed from what is better known to what is less known, it is believed that little reason will be seen for thinking that the exclusion of the bailor from any action against the third hand ever got any important foothold in our law.

In an action of trespass brought in 1374 [65] by an agister, Cavendish, C. J., said:

"And I say in this case, he who has the property can have a writ of trespass, and he who has the custody, another writ of trespass."

[60] Under "Corone et plees del corone," Fitzherbert mentions the appeal of robbery some twenty-seven times, the appeal of larceny six times, and the appeal of felony twice.

[61] Under "Appell," Brooke mentions the appeal of robbery fourteen times, the appeal of larceny once, and the appeal of felony four times.

[62] 2 P. & M., 2 ed., 170.

[63] COMMON LAW, p. 166. See also LAUGHLIN, ANG.-SAX. LAW, p. 202.

[64] Y. B. 48 EDW. III, 20–8.

[65] *Ibid.*

Percy:

"Sir, it is true, but he who shall recover first will oust the other of his action; and so it will be in several cases, as if tenant by *elegit* is ousted, both shall have an assize, and if one recovers first, the writ of the others is abated, *sic hic*." [66]

Like language was used by counsel in 1344 in an action for the recaption of beasts against the peace brought by one who claimed that the one from whom the beasts had been taken was his villein. Huse said:

"A writ of trespass and a writ of appeal are given to him to whom the property belongs, and also to one out of whose possession the goods are taken, because both servant and master will have an appeal in respect of the same felony." [67]

It is evident that the twofold basis of property and custody or possession for an action for a taking against the peace was not new with Cavendish, C. J., in 1374, nor peculiar to trespass. As we shall see, it was the current doctrine as to the appeals in the preceding century. The special significance of this case is the argument for two actions based on the practice in the appeals as to the master and servant. That practice goes back to our earliest extant plea rolls in 1194.[68]

The notion that two rights were protected by the appeals of Robbery and Larceny is emphasized in the "Mirror of Justices:"

"In these actions two rights may be concerned — the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance, where the thing has been lent, bailed, or let); and the right of property, as is the case where a thing is stolen or robbed from the possession of one to whom the property in it belongs." [69]

Britton also emphasizes both property and custody. He says "that if those who rob, or steal the goods of another, amounting to twelve pence or more, be freshly pursued for the same by those to whom the things belong, or by those out of whose custody the things were stolen or robbed and the goods are found on them, they shall

[66] 1 GRAY, CASES ON PROPERTY, 255.

[67] Y. B. 18 & 19 EDW. III, 508. See also FITZ. ABR. REP. 32.

[68] 1 ROT. CUR. REG. 51.

[69] SEL. SOC., bk. II, c. 16, p. 57.

be forthwith taken." [70] And again, that if the defendant be acquitted "and yet the prosecutor has proved that the thing challenged belonged to him, and that it was stolen from him or out of his custody, in such case he must be answerable to the lord of the thing." [71] The corresponding passage in Bracton is to the same effect: "And it does not matter whether the thing carried away was the appellant's own or another's, provided it was in his custody." [72]

These statements are brief and unsatisfactory. They were incidental to an account of criminal proceedings and lack the precision they would have had if they had been part of an exposition of the law of bailments. They allow the appeals to the owner and to the one having custody and leave us to speculate as to whether the owner whose goods were taken from the custody of another was allowed them or not. They give little if any indication, however, that such a one was denied them and by their emphasis on property and custody must have helped pave the way for the law as we find it in the following century.[73]

There are two other passages in Bracton bearing on the rights to the appeals. The first occurs in the general discussion of actions, and is as follows:

"And it is to be known that the *actio furti sive condictio* is competent to the owner of the thing against the thief and his successor and against the holder of the thing. The action *vi bonorum raptorum*, on account of movables carried off by force or robbed, is allowed to the owner of a thing or to him from whose custody they have been carried off and who has entered into payment in relation to his lord so that he has an interest to bring the action." [74]

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[70] 1 NICH. 55.

[71] *Ibid.*, 59

[72] Fol. 151.

[73] The emphasis on property and custody is merely a reflection of the case law of the time. Numerous appeals are quashed because the goods are not the appellant's. See SEL. PL. CR., pl. 138, and BRAC. NO. BK., pl. 1664. In the latter case one of the appellants alleged custody in himself. This is one of the cases cited by Bracton to show that some interest in addition to custody was necessary to support an appeal. (*Infra*, p. 512.) See also BRAC. NO. BK., pl. 1456 and 723. In a case where one Edith had brought an appeal and had offered her brother Richard to wage battle for her, the appeal was quashed because it was waged by the said Richard of other cattle than his own and nothing was said in the appeal as to their having been stolen from his custody, nor was anything of his own involved. BRAC. NO. BK., pl. 824.

[74] TWISS, fol. 103 *b*; BRACTON & AZO, p. 179.

Maitland's note on this is instructive. He says:

"Bracton in a desultory way is endeavoring to identify English with Roman actions. . . . Apparently when here and elsewhere Bracton speaks of the *actio furti* as of a practicable English action, he is referring to the exceedingly ancient procedure for the recovery of stolen goods which is lingering in the local courts, though its place is gradually being taken in the royal court partly by the definitely criminal appeal of larceny, partly by the civil actions of trespass and detinue. . . . He probably identifies the *actio vi bonorum raptorum* with the appeal of robbery. It will be noticed that he gives the *actio furti sive condictio* only to the *dominus* of the stolen goods, while the *actio vi bonorum raptorum* lies for the owner or for the person from whose custody the goods were taken if he has an interest in them. This is a curious departure from the Institutes and one that we should hardly have expected. All that we know of the history of the old English procedure for the recovery of stolen goods would lead us to believe that it was competent only to the person from whose possession the chattels had been taken, and that, therefore, if the goods were taken from the bailee, the action was open to the bailee, and not to the bailor. In the Institutes the *actio furti* is competent to many bailees. . . . In this respect the difference between the *actio furti* and the *actio vi bonorum raptorum* is not a strongly marked one. . . . The explanation may perhaps be that Bracton, in the furtherance of a movement which is gradually giving the bailor remedies against third persons, is inclined for the moment to go great lengths in the protection of mere *dominium;* but then we cannot be certain that there are not some kinds of bailment which in Bracton's view make the bailee *dominus rei.* English law is hesitating about these questions." [75]

The second of the other two passages in Bracton occurs in the treatment of the appeal of robbery and is an elaboration of what had already been said as to the *actio vi bonorum raptorum.* It is as follows:

"A person sometimes appeals another concerning the goods of another, and not his own, as if a person has been robbed of certain things, which he had in his charge, being property belonging to his lord or to another, and in which case it behooves him to show that he has an interest to appeal, because otherwise he will not have an appeal, no more than for the death of a strange person and concerning which we have partly treated, according as he has received a wound or such like. But concerning another person's goods it behooves him to show that they

[75] BRACTON & AZO, p. 182.

have been stolen out of his charge together with his own things, or without them, and that the keeper of them and the appellor has entered into the payment of so much money towards his lord." [76]

In support of what he says, Bracton cites two cases, one of which we have in his Note-Book,[77] and gives two illustrative counts. The great interest of the passage lies in the requirement of something more than custody to support the appeals. That is a matter for subsequent consideration, but in so far as Bracton would have denied the appeals to the custodian, it would seem that he must have allowed it to the owner.

It is evident that the case Bracton had especially in mind in these passages as to the appeal of robbery was that of the servant or the villein who was acting for his lord,[78] and the frequency with which the case of the servant or villein occurs in the case law of the time [79] makes it likely that the villein or servant was the one primarily in mind in the other and briefer passage from him and in those from Britton. In later times, too, it is the servant who is cited as having the appeals rather than the bailee.[80] We need not on that account, however, restrict the application of these passages to the servant or villein. It was long before custody was to be especially appropriated to the servant.[81] Bracton expressly includes the case where no lord is involved,[82] and writers with one accord have used these passages to show that the bailee had the appeals.[83] But if it is true that it was the case of the servant that was especially in mind where property and custody were mentioned as the basis for the appeals, it tends to confirm that intimate connection between the two actions for the bailor and bailee and the appeal by both master and servant which is evidenced by the remark of counsel in 1344.[84] The cases we have of that double appeal are cases where the master appealed first and the servant after him,[85] but where the servant had agreed to be responsible for the goods it seems likely that two separate ap-

[76] TWISS, fol. 146.

[77] Pl. 1664; *supra*, p. 510, n. 73.

[78] See also MAITLAND, BRACTON & AZO, p. 183.

[79] See cases cited, *supra*, p. 509, n. 68; p. 510, n. 73.

[80] Y. B. 18 & 19 EDW. III, 508; Y. B. 2 EDW. IV, 15–7, per Littleton; Staunf. P. C. 60 *a*.

[81] *Supra*, p. 502.

[82] *Supra*, p. 511.

[83] HOLMES, COMMON LAW, p. 168; Ames, "History of Trover," 3 SELECT ESSAYS, 424; 2 P. & M., 2 ed., 170.

[84] *Supra*, p. 508.

[85] See AMES, 3 SELECT ESSAYS, 425, n. 7.

peals must have been possible, for it does not seem likely that such an agreement could have been pleaded to defeat the appeal of the master.

One thing that makes it likely that the appeals of robbery or larceny may have been allowed to more than one person was their highly criminal character.[86] In an age when the criminal law was not contrary to but an expression of the spirit of the times, the increased importance of the criminal element in the appeals must have inclined the judges not to be overparticular as to the interest of the prosecutor when his interposition was not an impertinence.

With all this, if the question had come before the judges of the 1200's it is possible that they would have denied the appeals to the bailor; but they do not seem to have passed on such a question and, when trespass came in, the groundwork was already laid for giving the action to bailor and bailee alike.

How well the ground had been prepared [87] for Cavendish, C. J.'s, statement in 1374 giving trespass to the bailor on the basis of his property is evident from the unquestioned acceptance it received.[88] And, as we have seen, property was not divested by a bailment for a term,[89] nor at least in somewhat later days by a pledge.[90] Judges were not willing to give trespass to the bailor against one who took by the tortious delivery of the bailee, for it was hard for them to find in such a case any trespass *vi et armis*,[91] but some of them at least

[86] This is also a reason given by Professor Ames for giving the action to the bailee. LECTURES, p. 221.

[87] Professor Ames (3 SELECT ESSAYS, 424) cites Y. B. 16 EDW. II, 490, as evidence that the right of the bailor to trespass had already been recognized in 1323. This is probably an inference from Mutford and Herle, JJ.'s, distinction between a taking by a third party from the bailee and a *devant en sa main*. See AMES, LECTURES, p. 74, n. 1. Professor Ames, however, assumes that this was applicable only to the bailment at will. 3 SELECT ESSAYS, 424.

[88] Y. B. 22 EDW. IV, 5–16; Y. B. 21 HEN. VII, 39–49; Y. B. 20 HEN. VII, 5–15; Y. B. 3 HEN. VII, 4–16; Y. B. 6 HEN. VII, 12–9; Y. B. 16 HEN. VII, 2–7; Y. B. 20 EDW. IV, 11–10; Y. B. 2 EDW. IV, 25–26; Y. B 49 HEN. VI, 18–23; 2 ROLLE ABR. 569, pl. 5; COM. DIG. TRESPASS (B 4); BACON, ABR. TRESPASS (C 2); Parke, B., in Manders *v.* Williams, 4 Ex. 239 (1849); HOLMES, COMMON LAW, 171; Wms. Saunders, 47 *a*.

[89] *Supra*, p. 3, and see also what is said by Brian, C. J., Y. B. 17 EDW. IV, 2–2, translated in BLACKBURN, SALE (Can. ed.), p. 286.

[90] Fleming, C. J., in Ratcliff *v.* Davis, Yelverton 178, Bulstrode 29; Dodderidge, J., 3 Bulstrode, 17; Mores *v.* Conham, Owen 123.

[91] Y. B. 21 HEN. VII, 39–49; Y. B. 16 HEN. VII, 2–7; Y. B. 2 EDW. IV, 5–9; Ames, "Disseisin of Chattels," 3 SELECT ESSAYS, 550; 2 P. & M., 2 ed., 172.

were willing to give it to him when without any delivery the third party took with the consent which the bailee had no right to give.[92] And they allowed the action to the owner where the delivery to the third party was made by a servant.[93] The distinction between the servant and the bailee was gradually coming to be drawn.

Brooke's reason [94] for denying trespass against the second trespasser that the property had been changed by the tort could not have been used against the bailor for property was not changed by the bailment, and that Brian, C. J.'s, reason in the same case [95]—that the second trespasser was not a trespasser as to the one from whom the property had first been taken—was not applied against the bailor is more easily understood when we remember that it was apparently through the case of the master and servant that the law worked to that of the bailor and bailee.[96] The argument from the case of master and servant was used long afterwards to support the denial of trespass and trover to the bailor for a term,[97] but that was when the necessity of finding a violation of the possession of the plaintiff had become much more pronounced than it was in the earlier law.[98] Mr. Justice Wright accepted the modification in the law wrought by *Ward* v. *Macauley* in 1791 and *Gordon* v. *Harper* in 1796 denying the bailor for a term of trespass,[99] but, if in the following statement the words "under a revocable bailment" be omitted and the "right to possession" be changed to "right of property," it is believed to give a correct statement of the law as it existed before those cases were decided.

"A right in one person to sue for a trespass done to another's possession . . . exists whenever the person whose actual possession was violated held as servant, agent or bailee under a revocable bailment for or under or on behalf of the person having the right to possession." [100]

Constructive possession in the later law came to be identified with right to possession,[101] although as Mr. Justice Wright shows this

[92] See citations in n. 88, *supra*.

[93] Y. B. 2 Edw. IV, 4–9; Pollock & Wright, p. 153, n. 1.

[94] *Supra*, p. 383. [95] *Ibid.* [96] *Supra*, p. 512.

[97] Ward *v.* Macauley, 4 T. R. 489, by Buller, J.; Gordon *v.* Harper, 7 T. R. 9, by Grose, J.

[98] See *infra*, p. 518. This will be treated at greater length in a subsequent article.

[99] See notes 97 and 98, *supra*.

[100] Pollock & Wright, Possession, p. 145.

[101] Gordon *v.* Harper, 7 T. R. 9 (1796).

was by no means accurate even after *Gordon* v. *Harper*.[102] In the earlier law the judges do not seem to have felt the need of working out a constructive possession to support the right of the bailor to trespass, but there was a class of cases in which a constructive possession had to be worked out, and there it was worked out, not on the ground of right to possession, for such a ground would have given a right against the second trespasser,[103] but on the ground of property, and if in the earlier law need had been felt for it, this constructive possession could have been used to support the bailor's right.

In 1323, in course of the discussion in an action of detinue it was said [104] that if, after the death of an ancestor, a stranger took the title deeds before the heir had them, the latter would have an action of trespass, and on this being denied "because he was never in possession and *Quare vi et armis* does not lie except of a thing taken from another's [105] possession," it was replied "that after the death of his father he has possession at once although he does not have them in his hands." This rule that the heir might have trespass for title deeds before seizure, though he was not entitled to trespass for an injury to the land until entry, marked an important difference between trespass to realty and trespass to personalty, and this found expression in a case in 1522, where it was said:

"There is a diversity between a thing local and a thing transitory, for of those which are transitory one will be in possession without seizure as, if my tenant dies, his heir under age, I will have ravishment of ward without any seizure, but not an ejectment from wardship as to the land for that is local, and so if I give you my black horse which is in London now against any stranger the possession is in you and if any take him you will have an action of trespass for it is transitory." [106]

This and an earlier case in 2 EDW. IV[107] were the foundation for Brooke's statement that "by the gift the property is in him, and

[102] P. & W., Pt. III, ch. 1, 78.

[103] *Ibid.*

[104] 16 EDW. II, 490.

[105] Professor Ames translates *dautri* as "the plaintiffs" (LECTURES, p. 74, n. 1). It would seem, however, that the point made was that there could be no trespass *vi et armis* where the goods had not been taken from the possession of another and that here the heir had never had possession, so that it was not shown that any trespass *vi et armis* had been committed.

[106] Y. B. 14 HEN. VIII, 23 *b*.

[107] Fol. 25, pl. 26.

then the law adjudges possession . . . and it seems to be the law for goods are transitory while land is local."[108] This was applied in *Hudson* v. *Hudson*[109] to the case of the executor, where it was said that "property draws with it the actual possession of goods." Williams, in his notes to Saunders' Reports,[110] gives other examples illustrating the same principle, but he wrote after *Gordon* v. *Harper*,[111] and at the end of the paragraph cites that case as showing that there must be a right of possession as well as of property.

If, as seems likely, there was a time when delivery of seisin was as important in the transfer of a chattel as it was in the transfer of land,[112] we should have expected the actual seizure of the chattel to have been as much a prerequisite to trepass as an actual entry on the land, but the remedies for chattels were very much more limited than those for land, and the judges were not overparticular as to the one bringing trespass provided there had been an unlawful taking.[113] They harmonized the law of realty and personalty, however, by this fiction that the right of property in the case of personal chattels carried with it possession.

It is not surprising that the lawyers were less troubled about the possession of the bailor than they were about that of the heir or executor or vendee. It was more difficult to acquire possession than to lose it.[114] And where the goods had been taken from the bailee there was without doubt a trespass *vi et armis*, whoever might be entitled to sue for it. There was nothing in the writ to indicate that such violence as the writ called for had to be done to the plaintiff himself and, although the idea appeared at an early time that trespass to property was an extension of the protection thrown round the person,[115] this seems to have been applied where the person from whose possession the property was taken held not under or on behalf of[116] but adversely to the plaintiff.[117]

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[108] BRO. ABR. TRES. 303.

[109] Latch, 214, 263.

[110] 2 Wms. Saunders, 47 *a*.

[111] *Supra*, p. 515. See also *infra*, p. 518.

[112] 2 P. & M., 2 ed., 180; Maitland, 2 LAW QUART. REV. 496 n.; Cochrane *v.* Moore, 25 Q. B. D. 57 (1890).

[113] For abundant illustrations of this, see POLLOCK & WRIGHT, Pt. III, ch. 1, 5, 8.

[114] See HOLMES, COMMON LAW, p. 235 *et seq.*; POLLOCK & WRIGHT, POSSESSION, p. 18.

[115] *Supra*, p. 383.

[116] *Supra*, p. 504.

[117] See Ames, "History of Trover," 3 SELECT ESSAYS, 424, n. 5.

We have come to think of trespass as a distinctly possessory action, but there is nothing in the writ to indicate it as such and the sufficiency of possession itself to support trespass was not clearly established until the 1700's,[118] and then only with regard to land.[119] The first clear statement that denied trespass to the lessor for a term and placed that denial on the necessity of possession in the plaintiff comes from 1603.[120] It was an outcome of the tendency to draw more sharply the line between trespass and trespass on the case. The judges of the 1700's, however, made trespass a distinctly possessory action and this found expression in *Ward* v. *Macauley*,[121] where Lord Kenyon summarily denied trespass to the landlord for a term for furniture taken during the term on the ground that trespass was based on possession. He said the proper remedy in such a case was trover, as it was based on property. Five years later,[122] when trover was brought by a landlord under similar circumstances, he repudiated his *dictum* as to trover, said that it would be anomalous to allow the landlord under such circumstances to recover the full value of the property, and refused to express any further opinion as to what action would lie. Grose, J., was more specific as to the basis of trover. He said that it too was based on possession, that this might either be actual or implied, and identified constructive possession with right to possession. From that time it has generally been accepted that either actual possession or a constructive possession based on right to possession is necessary to both trespass and trover, but that there had been a departure from the earlier authorities was recognized by Baron Parke[123] and appears to have been accepted by Mr. Justice Holmes,[124] contrary as this was to the general trend of his argument.

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[118] The modern doctrine is stated by Willes, C. J., Lambert *v.* Stroother, Willes, 218, 221 (1740); Lord Mansfield, Harker *v.* Birkbeck, 3 Burr. 1556, 1563 (1764); Lord Kenyon, Graham *v.* Peat, 1 East 244, 246 (1801). See also AMES, LECTURES, p. 227. This will be taken up in a subsequent article.

[119] As late as 1840 Baron Parke regarded it as still an unsettled question with regard to chattels. Elliott *v.* Kemp, 7 M. & W. 306, 312 (1840).

[120] Bedingfield *v.* Onslow, 3 Lev. 209 (1685). In a Nisi Prius case in 1649 trespass was denied a bailor against the opinion of the reporter who was counsel in the case. Wilby *v.* Bower, Clayton 135, pl. 243; 1 GRAY, CASES ON PROPERTY, 241.

[121] 4 T. R. 489 (1791).

[122] Gordon *v.* Harper, 7 T. R. 9 (1796).

[123] Manders *v.* Williams, 4 Ex. 339 (1849).

[124] COMMON LAW, p. 172–3.

Apparently the only authority prior to *Ward* v. *Macauley* which tends to support the result reached there is Hale's Pleas of the Crown, where it is said of an indictment for larceny that "if A. have a special property in goods, as by pledge, or a lease for years, and the goods be stolen, they must be supposed in the indictment the goods of A.," [125] but Lord Hale cites no authority, and in East [126] and in the original text of Russell [127] it is said that in such a case the property may be laid in either the bailor or bailee. Under the influence of *Ward* v. *Macauley*,[128] however, the law came to accord with the statement in Hale and the text of Russell was changed.[129] Professor Ames [130] cites a case from the Year Books [131] to show that the pledgor was denied trespass at that time, but the point raised in that case was quite different and the case does not seem to have been so understood.[132]

That the change wrought by *Ward* v. *Macauley* and *Gordon* v. *Harper* was an improvement in the law is doubtful. The requirement of a right to possession in trover was termed a technical one by Field, J., in a case of pledge [133] and in the case of *Johnson* v. *Stear* [134] it was apparently overlooked entirely. It is hard to reconcile with the right of the bailor to trover or trespass when the bailee has a lien at the time the goods are taken from him.[135] If it is felt undesirable to allow the bailor to recover more than the value of his interest there are precedents for giving less than the full value of the property in trespass and trover.[136] But anomalous as it may seem, the old rule that either the bailor and bailee, even for a term, were allowed to recover the full value of the chattel had distinct practical advantages. The ascertainment of the respective interests in the chattel must ordinarily be even more uncertain

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[125] 1 Hale P. C. 513.

[126] 2 P. C. c. 16, § 90.

[127] RUSSELL, CRIMES, 8 Am. ed., 90.

[128] See the citations in Rex *v.* John Belstead, Russell & Ryan's C. C. 411 (1820).

[129] *Supra*, n. 127.

[130] Ames, "History of Trover," 3 SELECT ESSAYS, 425.

[131] Y. B. 10 HEN. VI, 25–86.

[132] BRO. ABR., TRES. 412; VIN. ABR., TRES. (E B) 563.

[133] Cumnock *v.* Newburyport Savings Inst., 142 Mass. 342, 346, 7 N. E. 869, 872 (1886), quoted 1 GRAY, CASES ON PROPERTY, 234 n.

[134] 15 C. B. (N. S.) 330 (1863), 1 GRAY, CASES ON PROPERTY, 213.

[135] Ames *v.* Palmer, 42 Me. 197 (1856), 1 GRAY, CASES ON PROPERTY, 246.

[136] See the cases cited in Johnson *v.* Stear, *supra*, n. 134.

than ascertaining the respective interests of landlord and tenant in land, and if a total recovery is to be allowed to either there would seem to be as much reason for allowing it to the owner as to the one having a less interest. In fact, the result reached in *Ward* v. *Macauley* and *Gordon* v. *Harper* would seem to be just another instance of the technicality which was introduced into the law by the attempt to differentiate trespass from case and which in part led to the reformed procedure.

Thus far we have been considering the case of a bailment where a trespass *vi et armis* had undoubtedly been committed and the question was as to who could sue for that trespass. The judges of the Year Books saw no difficulty in giving it to the bailor. But suppose the bailee destroyed the chattel which had been bailed to him. In such a case, could there be a trespass *vi et armis*, and aside from that, would not the allowance of trespass in such a case be an undue interference with the action of detinue? The judges of the late 1400's were bothered about these things,[137] but as a whole they seemed inclined to allow trespass *vi et armis* in such a case.[138] When Littleton said "If I lend to one my sheep to tathe his land, or my oxen to plow the land, and he killeth my cattell, I may well have an action of trespass against him, notwithstanding the lending,"[139] it was not a case of "Jove nodding."[140] Choke, his great contemporary, was even more explicit in allowing a general action of trespass in such a case.[141] On the other hand, the more conservative Brian, C. J., could not see the *vi et armis* in such a case,[142] and the development of the action on the case for a conversion made the matter unimportant as far as the civil remedy was concerned. In the Carrier's case like doctrine threatened to find its way into the criminal law.[143] Trespass was in a fair way to anticipate trover, but it is fortunate that it was not so, for the allegation that the defendant had "converted the goods to his own use" was so much

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[137] Y. B. 12 EDW. IV, 8–20; Y. B. 15 EDW. IV, 20 *b;* Y. B. 21 EDW. IV, 19–21; Y. B. 22 EDW. IV, 5–16.

[138] In Y. B. 22 EDW. IV, 5–16, Brian, C.J., lets the remark of counsel that trespass *vi et armis* would lie in such a case go by without comment.

[139] CO. LIT. 57 *a*.

[140] Prof. Beale refers to it as a "nod of Homer." 6 HARV. L. REV. 249.

[141] See the first two cases in n. 137, *supra*.

[142] Y. B. 12 EDW. IV, 8–20; Y. B. 13 EDW. IV, 9–5.

[143] Y. B. 13 EDW. IV. 9–5.

more general than the allegation that the defendant had taken and carried away the goods that it is doubtful whether trespass could ever have come to occupy that vast field which became the domain of trover. Trespass *vi et armis* to chattels continued to be of importance in the criminal law and the increasing emphasis placed on possession in the action of trespass made the judges feel that to apply to larceny the logic of the law of trespass as held by Littleton and Choke would be to condemn a man on a fiction; and so, although they went to great lengths in finding larceny where the felonious intent existed at the time of taking even though there had been a delivery, they refused to follow the lead of the Carrier's case and made necessary the modern statutes as to larceny by a bailee.

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